

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

LEWIS DOUGLAS,

Petitioner,

vs.

Case No. 2006-3391-AH

WARDEN HUGH WOLFENBAGER,

Respondent.

OPINION AND ORDER

Lewis Douglas petitions for a writ of habeas corpus. He filed the instant petition for habeas corpus on August 7, 2006.

According to the attached Prosecutor's Information, on April 16, 1973 petitioner feloniously committed murder while in the perpetration, or attempted perpetration, of a robbery contrary to MCL 750.316. *See* Appendix (a) of Petitioner's petition for writ of habeas corpus. On April 23, 1974 petitioner was sentenced to life imprisonment for murder in the first degree, MCL 750.316. *See* Appendix (b) of Petitioner's petition for writ of habeas corpus.

MCL 600.4310(3) provides that "an action for habeas corpus to inquire into the cause of detention may not be brought by or on behalf of...persons convicted, or in execution, upon legal process, civil or criminal." This statutory prohibition is generally consonant with often repeated judicial declarations that habeas corpus cannot serve as a substitute for an appeal and cannot be used to review the merits of a criminal conviction. *People v Price*, 23 Mich App 663, 669-670; 179 NW2d 177 (1970). Despite the general prohibition, habeas corpus is open to a convicted person in one narrow instance, where the convicting court was without jurisdiction to try the



defendant for the crime in question. *Id.* at 670. This exception is qualified by the requirement that the jurisdictional defect be radical. *Id.* It must render the conviction absolutely void. *Id.* A radical defect in jurisdiction contemplates an act or omission by state authorities that clearly contravenes an express legal requirement in existence at the time of the act or omission. *Id.* at 671.

The Court has reviewed the petition for writ of habeas corpus and finds it to be without merit. Petitioner was charged and found guilty of murder in the first degree. Petitioner was properly under the jurisdiction of the Oakland County Circuit Court. Petitioner argues that the Oakland County Circuit Court lacked subject matter jurisdiction over a charge under the common law felony murder doctrine because it was unconstitutional. Petitioner contends the doctrine of merger was abrogated and, as a result, invalidated the common law felony murder doctrine. Petitioner alleges since the charge of robbery was not included in the information his conviction was invalid.

The Court notes petitioner was convicted of murder in the first degree, contrary to MCL 750.316, not common law felony murder. MCL 750.316(1)(b) provides a person commits first degree murder if the murder is committed in the perpetration of, or attempt to perpetrate, robbery. This statute is constitutional. *People v Bills*, 53 Mich App 339, 358; 220 NW2d 101 (1974); *People v Moore*, 51 Mich App 48, 54; 214 NW2d 548 (1974). Although MCL 768.4 abolished the doctrine of merger, the felony murder statute, MCL 750.316, does not violate this abrogated doctrine. *People v Causley*, 299 Mich 340, 347; 300 NW 111 (1941); *People v Jones*, 209 Mich App 212, 530 NW2d 128 (1994). The charge of felony murder, as with any first degree murder charge, puts the defendant on notice that he must defend lesser included offenses to that charge. *People v Paul*, 395 Mich 444, 449; 236 NW2d 486 (1975).

Petitioner's contention, that failure to separately charge the underlying felony is a constitutional violation, is erroneous. Double jeopardy prohibits a conviction and sentence for the underlying felony supporting a felony murder conviction. *People v Akins*, 259 Mich App 545, 567; 675 NW2d 863 (2003). When a defendant is erroneously convicted of both felony murder and the underlying felony the proper remedy is to vacate the conviction and sentence for the underlying felony. *Id.* Here, upon review of the record provided, the Court finds petitioner was properly charged and convicted of murder in the first degree.

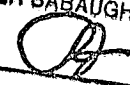
For the foregoing reasons, the petition for writ of habeas corpus is DENIED and DISMISSED. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last pending claim and CLOSES this case.

IT IS SO ORDERED.

Dated: August 21, 2006

DONALD G. MILLER
Circuit Court Case

CC: Lewis Douglas, In ProPer

DONALD G. MILLER
CIRCUIT JUDGE
AUG 21 2006
A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY:  Court Clerk